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No. 75-1108

In the Supreme Court of the United States

OCTOBER TERM, 1975

JERRY JAMES BORDEAUX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the warrantless stop of a vehicle he was driving, and the subsequent seizure of marihuana from his boat on an attached trailer, were unreasonable and that there was insufficient evidence to support his conviction for possession of the marihuana.

After a jury-waived trial in the United States District Court for the Southern District of California, petitioner was convicted of possessing approximately 1,767 pounds of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, to be followed by a special parole term of five years. The court of appeals affirmed (Pet. App. A).

Clyde Burnett, a United States Customs Patrol Officer, was assigned to patrol the boat docks, marinas, and harbor in the San Diego area during the summer months of 1974 (Tr. 5-6). Over a period of several weeks during that

period, his attention was attracted to a blue and white Sea Ray boat (Tr. 10, 25-26). He had seen the boat launched during daylight hours on several occasions but had never seen it taken out of the water. One day, after the boat was launched from a trailer, Burnett observed that the trailer and the vehicle to which it was attached proceeded to a nearby marina. The person driving the boat tied it up at one of the slips at the marina and then entered the vehicle pulling the trailer (Tr. 6-7). Burnett ascertained that the boat had a permanent berth at the marina (*ibid.*). These facts indicated to Burnett that, although the boat was being launched during the day, it was being taken out of the water late at night (Tr. 6).

A registration check on the boat revealed that petitioner was its registered and legal owner. A check on petitioner through the Customs computer indicated that he had previously been involved with marihuana or other narcotics in Arizona (Tr. 8-9, 31-33).

A Chevrolet Blazer was the only vehicle ever seen pulling the boat and trailer (Tr. 38). The Blazer was registered to Wilfred and Elizabeth Bordeaux at petitioner's address (Tr. 35-36). Burnett checked this address five or six times over a period of several weeks but never saw the boat or Blazer there (Tr. 8, 24, 36-37). On one occasion, the Blazer and trailer were followed from the launching area to an address on Lemon Street in La Mesa, California (Tr. 11).

On August 5, 1974, the boat was missing from its berth at about 7:00 P.M. (Tr. 10, 41). Burnett and other customs officers established surveillance at the La Mesa residence and at a ramp on J Street in Chula Vista where the Blazer and trailer had previously been seen. At about 11:00 P.M., Burnett was informed by radio that the Blazer and trailer were leaving the La Mesa address and were

proceeding toward the ramp. The Blazer circled the ramp area and then left and drove aimlessly around Chula Vista; it returned to the ramp area about 20 minutes later (Tr. 10-12, 41-42, 46). The Blazer waited for a short while at the ramp, circled the area, and again left and drove around Chula Vista, returning to the ramp a third time at about 1:00 A.M. (Tr. 12, 47-49). The boat still was not at the ramp. The Blazer thereupon left the area and returned to the La Mesa address (Tr. 12).

Shortly after the Blazer returned to the La Mesa address, the boat arrived at the ramp with co-defendants Spencer and Christopher aboard (Tr. 13, 50-51). The agents saw Spencer leaving the area and going to a public phone booth. Immediately after Spencer left the phone booth, Burnett was informed that the Blazer and boat trailer were leaving the La Mesa residence. The Blazer, driven by petitioner (Tr. 15), proceeded directly to the J Street ramp (Tr. 13, 51). Burnett was informed by his fellow officers that the boat was coming up out of the water and was at the top of the ramp (Tr. 15). Burnett started to move toward the ramp. He was then informed that the boat was being moved back down toward the water (Tr. 15-16). As he approached the vehicles, Burnett saw them going into the water. He noticed that the tires on the trailer were low and that one was flat, indicating to him that the boat was heavily loaded (Tr. 16, 54). When Burnett became aware that the boat was moving toward the water, he believed that the individuals involved had discovered the surveillance and were trying to escape. Burnett pulled up alongside the Blazer and ordered petitioner to stop (Tr. 18). Burnett observed no recreational equipment or fish in the boat (Tr. 54-55).

When the other officers arrived at the scene, Burnett got out of his vehicle and walked back to the boat and trailer (Tr. 17). The top of the boat was about five feet from the

ground (Tr. 52). Burnett could see marihuana in plain view underneath some canvas when he looked over the side (gunnels) of the boat without moving the canvas (Tr. 17). A subsequent search of the boat revealed the marihuana that was the basis of petitioner's conviction.

1. Petitioner contends that the stop of his boat and the subsequent seizure of the marihuana were unlawful because the customs officers did not have a reasonable suspicion of illegal activity justifying the stop. That factual contention was correctly resolved against petitioner by both courts below. As the court of appeals held (Pet. App. A):

> The evidence before the district court was sufficient for its determination that customs officers had clear founded suspicion to stop and interrogate the defendant. The stop being lawful, the marihuana was in plain view and its seizure proper.

Petitioner does not challenge the correctness of the "founded suspicion" standard. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873. His argument is that the court of appeals erred in concluding that the standard was satisfied on the facts of this case. The evidence as summarized above, however, clearly supports the court of appeals' ruling, and the issue does not warrant further review.

2. Petitioner contends that the evidence was insufficient to prove that he was in possession of the marihuana. The contraband was found in a boat registered to petitioner, and the boat was on a trailer hitched to a vehicle that petitioner was driving. Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, it was ample to support a finding by the trier of fact that petitioner had constructive possession of the marihuana.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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